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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 73

IDA PHILLIPS,
Petitioner,

v.

MARTIN MARIETTA CORPORATION,
Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR NATIONAL ORGANIZATION FOR WOMEN

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1058

IDA PHILLIPS,

Petitioner,

v.

MARTIN MARIETTA CORPORATION,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR NATIONAL ORGANIZATION FOR WOMEN

Having been denied consent to file a brief amicus curiae by the Martin Marietta Corporation, the National Organization for Women respectfully prays that the Supreme Court of the United States grant it leave to file a brief amicus curiae in the case of Ida Phillips v. Martin Marietta Corporation now before the court.

Motion for Leave to File a Brief Amicus Curiae and Interest of Amicus

The National Organization for Women (NOW) was founded in 1966 by women and men concerned by the personal and national losses resulting from discrimination against women. The purpose of the organization is "to

take action to bring women into full participation in the mainstream of American society, *now*, exercising all the privileges and responsibilities thereof in truly equal partnership with men. This purpose includes, but is not limited to, equal rights and responsibilities in all aspects of citizenship, public service, employment, education and family life and it includes freedom from discrimination because of marital status or motherhood." (§ 2 of Chapter by-laws of National Organization for Women.)

In an effort to implement its goals the National Organization for Women has taken stands on and worked for the passage of an equal rights for women amendment to the United States Constitution, abolition of laws penalizing abortion, revision of state protective laws for women, and amendments to the Civil Rights Act of 1964 which would grant the Equal Employment Opportunity Commission the power to issue cease and desist orders.

In pursuing these goals NOW has solicited a broad membership guaranteeing the right to join regardless of race, color, sex, religion, national origin, age or economic status. The organization has over 50 chapters in more than 24 states and a paid membership in excess of 3000.

The need for an organization to promote and protect the rights of women, and in particular working women, is clear. The 1969 HANDBOOK ON WOMEN WORKERS (hereinafter HANDBOOK) published by the Women's Bureau of the United States Department of Labor, reports that while sixty-five percent of the growth of the national labor force since 1940 has been due to the increase in number of women workers (HANDBOOK, p. 5), the incomes of women working full time is not only less than two-thirds of that earned by men working full time, but also the gap between men

1956 and 1966 (HANDBOOK pp. 133-4). Despite the passage of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, the trend in favor of discrimination does not appear to be abating.

In this context the case of *Ida Phillips v. Martin Marietta Corporation* now before the court is of immense importance. As stated by Chief Judge Brown in his dissent from denial of rehearing and petitioner in his brief, if the decision of the United States Court of Appeals for the Fifth Circuit is upheld, "the Act is dead," (416 F. 2d 1257, 1260 (1969)) at least for women, and with it the rights of women will have been severely curtailed.

In their briefs requesting writ of certiorari petitioner and the United States have expressed overriding concern for the preservation of the entirety of Title VII. They understand that the decision below would undermine the efficiency of Title VII with regard to racial, religious and national origin, as well as sexual discrimination. For this reason neither petitioner nor the United States has devoted its full attention to the issue of sex discrimination. Neither has, for example, explored the effects of the decision below on other governmental projects, such as day care centers and work incentive programs, which are designed to assist and encourage mothers with preschool children to seek and maintain employment.

NOW, representing a more narrow institutional interest than either petitioner or the United States, is primarily concerned with women's freedom from sex discrimination. The direct importance of the case to the 14.4 million mothers with preschool children and the implications for all American women require the fullest possible consideration of the issues. NOW, as an organization dedicated to

the equality of women, therefore requests leave to file a brief amicus curiae in the case of *Ida Phillips v. Martin Marietta Corporation.*

Respectfully submitted,

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Statement of Case

The question before the Court is whether an employer may escape the prohibitions against discriminating on the basis of sex contained in Title VII of the Civil Rights Act of 1964 when it refuses to hire women with preschool children while at the same time it hires men with preschool children.

The pertinent provision of the Act states: "It shall be an unlawful employment practice for an employer . . . to . . . refuse to hire . . . any individual . . . because of such individual's . . . sex." (§703(a) of Civil Rights Act of 1964, (42 U. S. C. 2000(e)-2(a)).

In reviewing petitioner's claim, the Court of Appeals below stated:

> "The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta" (411 F. 2d 1 at 4 (1969)).

The Court concluded that the hiring practices of Martin Marietta were permissible because they only discriminated against a sub-class of women, "*i.e.*, a woman with preschool age children" (411 F. 2d 1 at 4 (1969)). The effect of these two statements is that a prima facie violation of the Act cannot be established unless an employer denies employment to *all* women.

Thus the initial issue before the court is *not* whether the respondent has violated the Act (although there may be sufficient facts to make such a determination) *nor* is the issue whether the Act envisions circumstances in which men and women may be lawfully treated differently. Rather, *the initial issue before the court is whether a prima facie case of discrimination exists against the employer when he imposes conditions to the hiring of persons of one sex that are not applied to persons of the other sex.* Once the complainant has established a prima facie case of discrimination, the burden then shifts to the employer to show that "sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." § 703(e) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(e). *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228 at 232 (1969).

ARGUMENT

I. The impact of the decision below on the right of women to be free from discrimination in employment indicates Congress did not intend the result reached by the courts below.

a) The result is inconsistent with the overall federal policy of enabling women to work.

As the Court below recognized, "it is well established administrative law that the construction put on a statute

by an agency charged with administering it is entitled to deference by the courts . . ." (411 F. 2d 1, 3 (1969)). It is also well recognized that in construing the provisions of an act the courts should look to the provisions and interpretations of related acts, (*Universal Camera v. NLRB*, 340 U. S. 474 (1951)) and should take into account the impact of its interpretation upon related acts. *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U. S. 797 (1945).

The sex discrimination provisions of the Civil Rights Act of 1964 are only a part of the federal statutory scheme designed to prohibit discrimination against women in employment and promote growth and stability in the national labor force. In the Equal Pay Act of 1963 the Congress specifically declared that "wage differentials based on sex . . . depress wages and living standards . . . prevent the maximum utilization of . . . labor resources . . . burden commerce . . . and constitutes an unfair method of competition." 77 Stat. 56 (1963). After the passage of the Civil Rights Act of 1964 the Congress reaffirmed that "[i]t is the policy of the United States to insure equal employment opportunity for employees without discrimination because of . . . sex . . ." 5 U. S. C. § 7151 (1966) and directed the President to use his powers to implement the policy. By executive order the President charged the Secretary of Labor with the responsibility of ensuring that contractors with the United States take affirmative action so that they will not discriminate on the basis of sex (Executive Order 11375) and the Civil Service Commission with the responsibility of ensuring equal opportunity for women in federal employment (Executive Order 11478).

Beyond the affirmative action involved within the scope of the executive orders the Congress has specifically re-

quired that vocational training programs such as the Job Corps be open to female applicants (42 U. S. C. § 2711) and reinforced its determination in the case of the Job Corps by amending the statute to mandate a minimum percentage of females in the program (42 U. S. C. § 2728 (b)). The regulations issued under Work Incentive Program (42 U. S. C. § 630 *et seq.* (1967)), provide vocational training for mothers who are receiving or might in the future receive public assistance, *and* provide day care centers for their *preschool children* (33 Fed. Reg. 10026 (1968)). The federal government sponsors at least fourteen other programs which help finance child care centers as well as five programs to train day care personnel and four programs for experimentation designed to improve child care.[1]

National policy to ensure equal employment opportunity for all women, including mothers with preschool children, has been reflected in decisions concerning the interpretation of sex discrimination prohibitions. It is not only the EEOC which has determined that refusal to hire women with preschool children is discrimination based on sex. The Labor Department has issued proposed regulations on the same question:

> "An employer should not deny employment to women with children . . . unless it has similar exclusionary policies for men . . ." (60 C. F. R. 60-20.3(b)).

This determination should also be given deference in determining what constitutes discrimination against women.

Equally important are the effects of the decision below upon the affirmative Acts which are designed to train women workers and facilitate their employment. It is against

[1] See, *Federal Funds for Day Care Projects*, Women's Bureau, U. S. Department of Labor

common sense to suppose that Congress would guarantee equal employment opportunity to women, provide for training of women workers, provide support for day care centers, yet intend to allow employment discrimination against women with preschool children.

b) The number of women who may be adversely affected by the decision below indicates its inconsistency with Congressional intent.

In 1968, 29,204,000 women were in the labor force and constituted over 37% of the labor force in the United States. HANDBOOK p. 9. The following table outlines selected personal characteristics of women who were in the labor force in 1967.

Selected Characteristics of Women in the Labor Force[2]

Characteristic	Number in millions (000,000)	Percent of total women in labor force
Total Women in Labor Force	27.5	100.0%
Single	5.9	21.5
Married	17.5	63.5
Husband present	15.9	57.8
Husband absent	1.5	5.7
Widowed	2.5	7.0
Divorced	1.6	6.0
Mothers in the labor force		
with children under 18	9.7	35.2
with children under 6	3.7	13.4

Child Care Arrangement of Working Mothers with Children under 6 by percent[3]

Care in child's own home		47%
by father	14.4%	
by others	32.6%	
Care outside child's home		53%

[2] Source, HANDBOOK pp. 23 and 48 (Tables 7 and 21). Totals may not add exactly due to rounding.

[3] Source, HANDBOOK p. 49 (Table 22).

The decision below would permit any employer to refuse to hire any of the 3.7 million mothers with children under six who are currently in the labor force as well as the additional 10.7 million mothers with children under six potentially in the labor force.[4] The decision takes note of "the differences between the normal relationships between working fathers and working mothers to their preschool age children . . ." (411 F. 2d 1 at 4 (1969)) but does not require the employer to justify his employment practice either in terms of the needs of the business or in terms of the disability of the applicant. The rule does not take into account that over 10% of working women are heads of families (HANDBOOK p. 128, Table 56). Nor does the decision take into account that in families where mothers work, almost 15% of their husbands care for the children while the mothers work (see chart above). The decision below simply says that Title VII of the Civil Rights Act of 1964 affords no protection to women with preschool children.

In support of its position that mothers with preschool children fall outside the Act, Respondent in its brief in opposition to the writ of certiorari cites the case of *Cooper v. Delta Airlines, Inc.*, 274 F. Supp. 781 (1967), for the proposition that women who are married may be refused employment on the basis of their marital status without violating the Act. While the 5th Circuit below characterized that case as one which permitted employers to refuse to hire all married persons, Respondent's reliance upon it indicates the inevitable implications of the decision below. If an employer need not explain or justify why women with preschool children are refused employment, if the employer need only link femininity with some other characteristic to avoid the Act, then employers who refuse to hire women who are married must also be outside the

[4] Interpolation from HANDBOOK p. 39 (Table 16).

scope of the Act. Unlike the determination in *Cooper v. Delta Airlines, Inc., supra*, there is no requirement that the rule apply without regard to sex.

The effect of removing the protection of the Act from married women would be to deny equal employment opportunity to over 63% of the women in the labor force (see chart above). Over seventeen million Americans currently in the labor force would then be subject to discrimination on the basis of a characteristic—being women—which they are born into, but which bears no relation to their ability to perform the work desired by the employer.

Under the reasoning of the court below any of the selected characteristics listed in the chart above could be used to avoid the prohibition on sex discrimination of the Civil Rights Act of 1964. The Court of Appeals decision allows an employer to discriminate so long as he hires some class of women without regard even to the size of that class. It is not reasonable that the Congress would have passed an act with such limited effect. There is no evidence that this was their intention and such futility should never be presumed.

II. The decision below is inconsistent with the language of the statute and the interpretation of it by the courts to the extent it requires discrimination be directed against an entire class to constitute a violation of § 703(a).

The Court of Appeals below stated:

> "When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin" (411 F. 2d 1 at 3-4 (1969)).

This means that the employment practice must apply to the entire class, all women, before a violation of § 703(a) can be established. Such an interpretation does not make sense as it would allow a company to refuse to hire women who are under sixty-five (no discrimination on the basis of sex) or refuse to hire Italian men who are single (no discrimination on the basis of national origin) or refuse to hire Jews who do not have PhD's in nuclear physics (no discrimination on the basis of religion) or, refuse to hire blacks who are not over six and a half feet tall (no discrimination on the basis of race or color). The fact that such results would strip the statute of practical meaning should have indicated there was a problem in the Fifth Circuit's reading of the statute.

If the statute were to read—employment discrimination against all women shall be unlawful—, then it might be an open question whether the intent of the statute was to prohibit "discriminations only when they apply to all women" or to prohibit "all discriminations against each and every women that was based on her femininity." § 703(a) of the Civil Rights Act of 1964, however, did not frame the statute in that manner. The statute states that it is unlawful to refuse to hire an individual "because of such individual's race, color, religion, sex or national origin." The statute makes unlawfulness turn on the basis by which the employer distinguishes between the person hired and the person refused. If the difference between the person hired and the person refused is the individual's race, color, religion, *sex*, or national origin, then the employment practice is unlawful. In Mrs. Phillips' case, it is obvious that the basis of Martin Marietta's refusal to hire her was her sex. The District Court found Martin Marietta "does employ males with preschool children"

(Petitioner's Appendix p. 23a). Martin Marietta refused to hire Mrs. Phillips because she had preschool children. The corporation's rule distinguishes between applicants who have preschool children on the basis of the individual's sex.

The Court of Appeals "coupling" rationale ignores the terms of the statute. It fails to determine the basis on which the employer distinguishes between similarly situated applicants. Sex-plus hiring practices could only be held lawful if § 703(a) prohibited discrimination solely when it was practiced against an entire class. Such an interpretation is not only inconsistent with the words of the statute, it is also implicitly inconsistent with previous cases.

Because it had never been suggested, before the decision below, that § 703(a) covers only discrimination against entire classes, the courts have never explicitly ruled upon the question. Nevertheless decisions concerning the Act have consistently found violations where less than the entire class was subject to discrimination. For example in *Quarles v. Philip Morris*, 279 F. Supp. 505 (1968), the court found a violation even though the discriminatory seniority system only affected blacks hired prior to passage of the Civil Rights Act of 1964. Cf. *United States v. Local 189 United Papermakers and Paperworkers*, 282 F. Supp. 39 (1968), *Bing v. Roadway Express Inc.*, 60 CCH Labor Cases 9232 (1968) (Not otherwise reported).

These cases were of course more difficult than the case now before the court. The cases dealt with rules that did not apply solely to blacks or even affect all black employees; rather the rules primarily affected some black employees. Unlike the rule which barred Mrs. Phillips,

the rules in those cases were neutral on their face. Only after a factual determination were the rules characterized by the courts as being discriminatory and then only as to some black employees. It was not thought necessary and indeed would have been impossible to show that all black employees suffered from the rule. The only factual inquiry that is necessary is that the employer based his employment practice upon a forbidden criterion—race, color, religion, sex or national origin. Once such determination is made a prima facia case of discrimination is established.

The District Court determined that the Martin Marietta Corporation hired applicants with preschool children except those of the female sex. This determination should have compelled the court to find that the Martin Marietta Corporation had engaged in an employment practice prohibited by § 703(a) and constituted a prima facia violation of Title VII of the Civil Rights Act of 1964.

III. The order on remand should require Respondent to justify its employment practice under § 703(e).

Respondent may feel a determination that it has refused women employment in violation of § 703(a) is unjust because it has a high percentage of women employees. But such a determination does not preclude Respondent from showing that the use of sex as a hiring criterion is justified. § 703(e) of the Act specifically recognizes that an individual's religion, *sex*, or national origin may be an appropriate hiring criterion in certain instances. For example sex is appropriate where the employment involves the portrayal of a member of one sex (29 C. F. R. 1604.1(2)). Respondent has the opportunity to show that its hiring rule is "reasonably necessary to the normal

operation of [its] business . . ." (§ 703(e) of the Civil Rights Act of 1964, 42 U. S. C. § 2,000e-2(e)).

The Court of Appeals for the Fifth Circuit has set out the basic standard by which Respondent's justification of its hiring practice should be judged in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228 (1969).

> "We conclude that the principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." 408 F. 2d at 235.

Respondent should be required to prove that all or substantially all women with pre-school age children would be unable to perform the duties of the job involved.

Conclusion

For the foregoing reasons it is urged that the Court should reverse the ruling below.

Respectfully submitted,

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Certificate of Service

I, Jacob D. Hyman, attorney of record for Amicus Curiae, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the day of April, 1970, I served the requisite number of copies of the foregoing Brief upon Jack Greenberg, James M. Nabritt, III, Norman C. Amaker, William L. Robinson, Lowell Johnston, Velma Martinez Singer, 10 Columbus Circle, New York, New York 10019, and Earl M. Johnson, 625 West Union Street, Jacksonville, Florida 32202, Attorneys for Petitioner and William Y. Akerman, Suite 506 First National Bank Building, P. O. Box 231, Orlando, Florida 32802, Attorney for Respondent and Erwin Griswold, Solicitor General, Department of Justice, Washington, D. C. 20025, by depositing the same in the United States mail, air mail postage prepaid, and properly addressed to them at the addresses given.

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